

CATCHWORDS

IMMIGRATION - Judicial review - decision of Immigration Review Tribunal - requirements for December 1989 (temporary) entry permit - application by father to remain permanently in Australia - whether refusal would cause extreme hardship to daughter living in Australia - whether daughter satisfied requirements of "nominator" - whether Tribunal erred in not substituting alternative nominator.

Immigration Act 1958, Part 8.

Prasad v Minister for Immigration, Local Government and Ethnic Affairs (1993) 30 ALD 850.

Hakim v Minister for Immigration and Ethnic Affairs (1994) 49 FCR 495.

Yong v Minister for Immigration and Ethnic Affairs (1994) 54 FCR 176.

Hamilton v Minister for Immigration and Ethnic Affairs (1994) 53 FCR 349.

Dharam Raj v Minister for Immigration and Ethnic Affairs (No. NG 40 of 1996) 18 July 1996, unreported.

ANISELINA TAUALLI v MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS
No. VG 99 of 1995

NORTHROP J
MELBOURNE
6 DECEMBER 1996

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

GENERAL DIVISION

No. VG 99 of 1995

B E T W E E N :

ANISELINA TAUALII

Applicant

A N D :

MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS

Respondent

COURT: NORTHROP J

PLACE: MELBOURNE

DATE: 6 DECEMBER 1996

MINUTES OF ORDERS

THE COURT ORDERS THAT:

1. Leave is refused to the applicant to rely upon the affidavits of John Young sworn 22 November 1996, Losi Tukuafu sworn 20 November 1996 and 25 November 1996 respectively, Folole Faleafa and Aniselina Taualli sworn 20 November 1996.
2. The application be dismissed with costs.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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REASONS FOR JUDGMENT

The applicant, who in these reasons will be called Aniselina, brings this proceeding under the provisions of Part 8 of the *Migration Act* 1958 to review a judicially-reviewable decision made by the Immigration Review Tribunal. Aniselina is a daughter of Siaosi and Sosefina. The family are of Tongan nationality. Siaosi and Sosefina were married in Tonga on 18 December 1963. There are five children of the marriage all of whom live in Australia. Their names and dates of entry to Australia are: Aniselina, 13 June 1985; Latu, 26 September

1987; Semisi, 13 June 1985, Lopini, 1985 and Tongavua, 1986. In addition Siaosi and Sosefina have two adopted daughters Losi and Folole each of whom live in Australia.

Sosefina entered Australia on 29 October 1986 pursuant to a temporary entry permit for 21 days. Siaosi entered Australia on 26 September 1987 pursuant to a temporary entry permit valid until 7 October 1987. Each has remained in Australia since their first entry. Each attempted, unsuccessfully to obtain further permits but it is not necessary to refer to those attempts.

Upon his temporary entry permit expiring on 7 October 1987, Siaosi became an illegal entrant under the then provisions of the Migration Act. By reason of later amendments to the *Migration Act* he was an unlawful non-citizen in May 1992. His wife Sosefina, likewise, was an unlawful non-citizen in May 1992. In *Teoh v The Minister for Immigration and Ethnic Affairs* (No. VG 787 of 1995)¹² July 1996, unreported, I referred to the many amendments made to the *Migration Act* and the terminology by which unlawful non-citizens were described. That authority illustrates the difficulties arising in achieving an understanding of the *Migration Act*.

For the purposes of these proceedings, it is sufficient to say that on 25 May 1992 Siaosi made application to the Department of Immigration, Local

Government and Ethnic Affairs on a form entitled "Application to Remain Permanently in Australia Under Concessions for Persons Illegally in Australia". The form was numbered 903 and was said to be the form to be used by a person who was illegally in Australia on or before 18 December 1989. In the terminology of those used to these matters, it is said that the application Form 903 applies to persons seeking a December 1989 (temporary) entry permit (class 440). The person making the application is often described as the "Principal".

The application was made by Siao Si on his own behalf, on behalf of his wife, and on behalf of those of his children who were illegally in Australia. The application was stated to be for a temporary entry permit and/or a permanent entry permit in Category 440 and Category 812 respectively, namely "Compassionate grounds under which hardship would be caused to an Australian citizen or permanent resident if the applicant for the permit were required to leave Australia".

Part of the application form was headed "Section H - Compassionate Grounds, to be completed by Nominator (Australian person)". A note is then set out:-

"69. The Migration Regulations provide for applications to be

considered on compassionate grounds. The applicant is required to show that there are compassionate grounds of such magnitude that rejection of the application would create:

- extreme hardship; or
- irreparable prejudice

to the interests of the Australian citizen(s) or permanent resident(s) involved with the applicant."

This section was filled in by Aniselina as nominator. She circled the words "extreme hardship" in note 69. She stated on the form that she was a permanent resident of Australia who had arrived in Australia on 13 June 1985.

In making the application Siaosi and Aniselina were assisted by Mr John P Young, a registered migration agent under the *Migration Act*. Mr Young prepared a submission in writing in support of the application. The submission is undated. It was signed by Mr Young and acknowledged by Siaosi and Aniselina each signing the submission. The application and the submission were lodged with the Department on or about 25 May 1992.

In order to understand the application, it is necessary to make brief reference to some of the provisions of the *Migration Act* and the Migration Regulations in operation at the time the application was made. It is almost impossible to trace the relevant legislation and regulations by following the Acts and Regulations. For the purposes of these proceedings, there was no dispute as to these statutory provisions. In these circumstances, it is sufficient if the Court sets out that part of the reasons of the Tribunal under the heading

"Legislative Requirements". In this passage the reference to "the Principal" is a reference to Siaosi. The passage is set out:-

"LEGISLATIVE REQUIREMENTS"

As a result of the coming into force of the *Migration Reform Act 1992* on 1 September 1994 Australian Migration Law has undergone significant changes. In accordance with regulation 22 of the Migration Reform (Transitional Provisions) Regulations, the Principal's application in this case, if successful, will now result in the grant of a transitional (temporary) visa under the new law. For most purposes this will resemble the visa that would have been granted under the law in force before 1 September 1994. However, Division 2 of Part 2 of the Migration Act 1958; (the 'Act') as in force before 1 September 1994 - which relates to the grant or refusal of visas - and the Regulations made for the purposes of that Division will continue to apply to the Principal's application. The applicable regulations in this case are therefore the 1989 Migration Regulations.

The criteria for a December 1989 (temporary) entry permit (class 440) are set out at item 59A of class 2 of Schedule 3 of the Migration Regulations (the Regulations). The criteria to be satisfied are those contained in regulation 131A and the alphanumeric symbols D, E and H1, which are further defined in Schedule 1 of the Regulations and may be summarised as follows:

D public interest criteria

E family unit members to meet public interest and health criteria

H1 health criteria in items 9 and 10 of Schedule 1

Regulation 131A at the time of the application provided as follows:

131A.(1) The following criteria are prescribed in relation to a December 1989 (temporary) entry permit:

- (a) *the applicant for the entry permit was a prohibited non-citizen on or before 18 December 1989;*
- (b) *the applicant was in Australia on, and has not left Australia since, 18 December 1989;*
- (c) *the applicant applies, in accordance with these Regulations, before 19 December 1993 for the entry permit;*
- (d) *on 15 October 1990 and continuously until the Minister decides to grant, or not to grant, the entry permit:*
 - (i) *the applicant has a genuine and continuing relationship as the spouse of an Australian citizen or of an Australian permanent resident; or*
 - (ii) *the applicant is a dependent child of an Australian citizen or of an Australian permanent resident; or*
 - (iii) *the applicant is an aged parent of an Australian citizen or of an Australian permanent resident and satisfies the balance of family test; or*
 - (iv) *the applicant is:*
 - (A) *an aged dependent relative; or*
 - (B) *an orphan relative; or*
 - (C) *a special need relative; or*
 - (D) *a remaining relative within the meaning of regulation 9;**of a settled Australian citizen or settled Australian permanent resident; or*
 - (v) *there is any other compassionate ground*

for the grant of an entry permit, to the effect that refusal to grant the entry permit would cause extreme hardship or irreparable prejudice to an Australian citizen or Australian permanent resident;

- (e) *if, in the opinion of the Minister, the applicant should not be granted an entry permit without an assurance of support, an assurance of support satisfactory to the Minister has been given;*
 - (g) *the applicant has been nominated by the relevant related person referred to in paragraph (d);*
 - (h) *the applicant notifies the Department, without unreasonable delay, of each change of his or her residential address.*
- (2) *In this regulation, 'compassionate ground' does not include a circumstance that results directly from an event of a political nature only that has occurred in the applicant's country of citizenship or of usual residence."*

For the purposes of these proceedings, in applying Regulation 131A, Siaosi is the applicant.

Difficulties arise in construing Regulation 131A but no issue has been raised relating to the construction. Siaosi satisfies the criteria specified in paragraphs 131A(1)(a), (b) and (c). Paragraphs 131A(1)(e) and (h) have no application to the facts of these proceedings. The sub-paragraphs to paragraph 131A(1)(d) are in the nature of true alternatives in the sense that if any one of them is satisfied, there is a compliance with the criteria set out in paragraph (d). The sub-paragraphs (i), (ii), (iii) and (iv) refer to Siaosi who does not satisfy any of the matters referred to therein. The relevant sub-paragraph is (v) which, for ease of reference, is set out:-

"on 15 October 1990 and continuously until the Minister decides to grant, or not to grant the entry permit, there is any other compassionate ground for the grant of an entry permit, to the effect that refusal to grant the entry permit would cause extreme hardship or irreparable prejudice to an Australian citizen or Australian permanent resident;"

The application of paragraph 131A(1)(g), as properly construed, is at the heart of the issue raised by these proceedings. It will be remembered that in the application for the December 1989 permit, it is stated that Siaosi was nominated by Aniselina. It is accepted as a fact that when the application was made in May 1992, Aniselina was neither an Australian citizen nor an Australian permanent resident within the meaning of those phrases when used in the *Migration Act* and Migration Regulations.

On 24 January 1994, a delegate of the Minister made a decision refusing to grant the entry permit sought by Siaosi in his application dated 25 May 1989. As appears from the reasons for decision given by the Tribunal, on 25 February, 1994, Aniselina applied to the Tribunal for a review of that decision which was described as the decision "to refuse Mr Siaosi Mekinton Taulii and his family, a December 1989 (temporary) entry permit (class 440) to remain in Australia". By that time, Aniselina had become an Australian permanent resident and being the nominator of Siaosi, had standing to make the application for review pursuant to the Migration (Review) Regulations. The review was heard on 29 September 1994. Mr Young appeared at the hearing to assist Aniselina and her parents. In addition at a later date, pursuant to leave granted, he presented to the Tribunal a submission in writing together with a written report by Donald V Conway, a clinical and counselling psychologist.

By its decision dated 12 January 1995, the Tribunal affirmed "the decision

under review not to grant the Principal (Siaosi) and his family a December 1989 (temporary) entry permit to enable them to remain in Australia". The essence of the reasons for making this decision was that the criteria, being that contained in sub-paragraph 131A(1)(d)(v), had not been satisfied since the "related person", Aniselina, was neither an

Australian citizen nor an Australian permanent resident for the whole of the period from 15 October 1990 to the date of the decision not to grant the permit, namely 24 January 1994. She became an Australian permanent resident on 12 March 1992.

Aniselina brings this application for review of the decision by the Tribunal under sections 476 and 478 of the *Migration Act* but under section 480 the parties are Aniselina in her capacity as the applicant in the review by the Tribunal and the Minister. Subsection 476(1) specifies the grounds upon which an application may be made for review by the Court. The grounds relied upon by Aniselina are those specified in paragraphs 476(1)(a), (c) and (e). The relevant parts of those paragraphs are set out:-

- "(a) that procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed;
- (c) that the decision was not authorised by this Act or the regulations;
- (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law ..."

The Court considers first the grounds (c) and (e) which can be dealt with together. The particulars given with respect to each of these grounds were the same. They are set out:-

- "(i) The Tribunal incorrectly interpreted the provisions of Regulation 131A(1)(d)(v) of the Regulations to require that an Australian citizen or Australian permanent resident referred to therein be such as at 15 October 1990.
- (ii) The Tribunal incorrectly interpreted the provisions of Regulation 131A(1)(g) of the Regulations to require that the nominator referred to

therein be an Australian citizen or Australian permanent resident as at 15 October 1990.

- (iv) The Tribunal incorrectly interpreted the provisions of Regulation 131A(1)(g) of the Regulations in holding that they bound it to regard the person set out as the nominator in the application form accompanying the application for the said entry permit as the only person who could be the nominator referred to in that Regulation.
- (vi) The Tribunal incorrectly interpreted the provisions of Regulation 131A(1)(g) of the Regulations in holding that as Aniselina Taualli was the nominator in the Application Form 903, it was unable to substitute another person as the nominator."

These grounds and particulars raise for consideration the proper construction of Regulation 131A(1)(d)(v) and Regulation 131A(1)(g). Regulation 131A has been set out earlier in these reasons and some comment has been made concerning its structure. Paragraph (g) requires that the applicant for the permit must have been nominated by a person who is a member of a class as defined. This is apparent from the words "nominated by the relevant related person referred to in paragraph (d)". One meaning to be given to the word related, where used with respect to persons, is connected by blood or marriage (The Shorter Oxford English Dictionary) and allied by nature, origin, kinship, marriage, etc. (The Macquarie Dictionary). This meaning is appropriate with respect to the person being an Australian citizen or Australian permanent resident referred to in paragraphs (d)(i), (ii), (iii) and (iv) since the specified person must be connected to the applicant by kinship, blood or marriage. On its face, the requirement of paragraph d(v) is not so limited. The only limitation is

that the person is an Australian citizen or Australian permanent resident who satisfies the requirements of that paragraph. Provided that person is associated or connected (Macquarie) with the applicant, that person would be a "related person" within the meaning of paragraph (g) and need not be related by

blood or marriage. This question need not be determined here since Aniselina is related to Siasoi by kinship and blood.

The opening words of paragraph 131A(1)(d)(v) suggest that the criteria specified must be satisfied on and from 15 October 1990 until the Minister decides to grant or not to grant the entry permit. The use of the word "continuously" supports this view. This view has been expressed and applied in many authorities of the Court and, in some cases, with unusual consequences; see, for example, *Prasad v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 30 ALD 850 per Jenkinson J at 857. On the same page his Honour graphically states the construction that what paragraph 131A(1)(d)(v) requires "is that the set of circumstances specified in (v) should exist at each moment on and after 15 October 1990 until the determination is made". This approach has been accepted in many other authorities and should be applied to the facts of this case. Here, Aniselina was not an Australian citizen or an Australian permanent resident on 15 October 1990. She first became an Australian permanent resident on 12 March 1992. Therefore the criteria in the subparagraph could not be satisfied by her.

The Tribunal applied this construction of Regulation 131A and held, correctly, that Aniselina did not satisfy the requirements of the criteria specified in paragraphs 131A(1)(d)(v) and 131A(1)(g) with the result it was not necessary

to consider whether any "other compassionate" ground existed.

Aniselina has failed to establish the grounds based upon paragraph 476(2)(c) and (e) of the *Migration Act* insofar as they are based on the particulars (i) and (ii) set out above.

The issues raised by particulars (iv) and (vi) remain to be considered. Particular (vi) was added by leave at the hearing of the proceeding. The particulars (iv) and (vi) relate to matters connected with the other ground relied upon by Aniselina namely paragraph 476(1)(a). When the proceeding came on for hearing, the only particular of that ground given by Aniselina related to Okalini Mafi, a person who, from time to time, was co-habiting with Aniselina and who was the father of her three children. At the hearing counsel for Aniselina abandoned those particulars. He sought leave to file and rely upon five fresh affidavits being one sworn by Mr Young on 22 November 1996, two by Losi Tukuafu, the adopted sister of Aniselina, sworn 20 November 1996 and 25 November 1996 respectively, one by Folole Faleafa, the adopted sister of Aniselina and one by Aniselina sworn on 20 November 1996. Counsel for the Minister opposed the granting of leave to file and rely upon these affidavits. The Court looked at the affidavits and allowed submissions to be made based upon them but reserved making a ruling on granting leave to file them.

The affidavits depose to matters that were not before the Tribunal. They

are sought to be used to establish a case different to that presented to the Minister and to the Tribunal. They are sought to be used to enable Losi to be made a nominator for the purpose of the application by Siaosi. None of that material was before the Tribunal.

Under the *Migration Act*, the Court has jurisdiction and power to review judicially reviewable decisions on specified grounds. The Court has no jurisdiction or power to make substantive decisions on applications under Reg 131A. The material contained in the five affidavits is directed to an attempt to entice the Court to make a substantive decision under the guise of a ground specified in section 476 of the *Migration Act*. This is

impermissible. Accordingly leave is refused to rely upon these five affidavits. In these circumstances the ground of review based on paragraph 476(1)(a) of the *Migration Act* is not made out. No particulars are given. There is no basis on which the ground can be supported.

The issues raised by the particulars (iv) and (vi) remain to be considered. The structure of Reg 131A leaves very little scope for the exercise of discretion. An applicant for a permit relying upon paragraph (d) must be nominated by a person coming within the specified class. Prima facie, it is the nominator who must satisfy one of the criteria specified in subparagraph (d)(v), but in considering that criteria the effect on other persons may be relevant. But as a condition precedent to a consideration of these matters the nominator must satisfy the requirements imposed by the opening words of paragraph (d). An application, at the time this application was made, was not in any prescribed form but the Department had prepared a form to be used, namely Form 903. The nominator had to be identified. One reason for this was to enable the Minister to determine whether the nominator was, at all relevant times, an Australian citizen or an Australian permanent resident. In these circumstances, it is possible that if the application did disclose a person who satisfied those requirements but who was not named as the nominator, the Minister, and the Tribunal when exercising the powers of the Minister, could treat that person as the nominator. Authorities of the Court have recognised the existence of this

discretion. But the person concerned should be identified sufficiently to enable the Minister to determine that person as a nominator and as a person who satisfies the requirements of the criteria. Generally see *Hakim v Minister for Immigration and Ethnic Affairs* (1994) 49 FCR 495 per Wilcox J at 498, *Yong v Minister for Immigration and Ethnic Affairs* (1994)

54 FCR 176 per Moore J at 498 and *Hamilton v Minister for Immigration and Ethnic Affairs* (1994) 53 FCR 349 per Davies J at 358.

In the present case the Tribunal, in its reasons, said:-

"Ms Aniselina Taualli the Principal's nominator did not become an Australian permanent resident until 12 March 1992. As she was the nominator in the application Form 903 the Tribunal is unable in the circumstances to substitute another person as the nominator to avoid the conclusion reached above (see also subregulation 131A(1)(g)). Although the adviser submitted that Mr Mafi as an Australian permanent resident as at 15 October 1990 and as spouse of Ms Aniselina Taualli should be regarded as the 'nominator' and the person who would suffer hardship or prejudice, the Tribunal is unable to accept this submission. On the material before it Mr Okalini Mafi was only referred to in passing in the application and the material submitted with it. The bulk of the references were to Aniselina. He did not submit any material to indicate that he was a 'nominator' for the Principal in the circumstances. Furthermore he was living in Sydney for much of the time when support was needed and not with Aniselina and her family. Indeed on his own evidence he only returned to Melbourne in February this year after an absence of more than 2 years. The relationship appeared far from secure and evidence regarding support from the family of Aniselina for him appeared self serving in the circumstances. Indeed when the Principal lodged the application Form 903 Mr Mafi was living in Sydney, apart from the Principal and his family in Melbourne. This case is distinguishable from *Hamilton v Minister for Immigration and Ethnic Affairs* (Full Court of the Federal Court, 1 November 1994, unreported)."

This was said in the context that at the hearing before the Tribunal it became clear that Aniselina was not qualified as a nominator, that Mr Young was aware of that fact and was concerned about it, that Mr Mafi gave evidence, that Mr Young suggested Mr Mafi be treated as the nominator, and that Mr

Young was given leave to make a submission in writing to support the treating of Mr Mafi as nominator. Mr Young did this. Further, it should be noted that the original particulars given to ground 476(1)(a) were abandoned even though they related to the position of Mr Mafi.

Having regard to these facts, a fair reading of the passage from the reasons for decision by the Tribunal make it clear that the Tribunal knew of the existence of the power to treat another person as nominator but that on the facts, Mr Mafi was not such a person. Although Losi and Folole were mentioned in the Form 903 and supporting submission and although each was stated to be an Australian citizen, no evidence existed to establish that fact and no suggestion was made that either should be treated as nominator. The Tribunal was not in a position to determine those matters. Nor, in the circumstances of this case, was it under an obligation to investigate the matter further; compare *Dharam Raj v Minister for Immigration and Ethnic Affairs* (No. NG 40 of 1996) 18 July 1996, unreported, per Davies J at 12-14, especially at 14 where his Honour said:-

"Mr de Robillard submitted that there was a duty on the Tribunal to go out and make inquiries of its own. In my opinion, no such duty is either expressed or to be implied from the Migration Act. Indeed, it would be quite inconsistent with the general principles of procedural fairness which are applied in this country. Those principles require parties to be given a fair opportunity to present material. They do not require a tribunal to make its own inquiries. It is ludicrous to suggest, as counsel

suggested, that the Tribunal should have made inquiries of Lidcombe Court as to what happened back in 1984, or that it should have itself approached the police or Mr Raj's medical practitioners for further information.

In this country we do not have examining magistrates such as are common in the administrative law systems of many European countries. We proceed upon the footing that the parties should have a fair chance to put their case. Of course, a tribunal does everything it can to assist the parties. It provides interpreters, if they are needed, and guides witnesses as to matters of fact to which their evidence ought to be directed, to matters which, in its opinion, are important, and which it may perceive have not been dealt with. But, beyond that, a tribunal certainly has no duty to go out itself and make inquiries of people who are not before it."

This passage has dual application especially to the facts of this case where Mr Young, a registered migration agent under Part 3 of the *Migration Act* was, at all material times, advising and assisting Aniselina and her family.

Aniselina has failed to establish the grounds relied upon. The decision of the Tribunal involved no error of law.

Accordingly the application for review is dismissed with costs.

I certify that this and the preceding fourteen (14) pages are a true copy of the Reasons for Judgment of the Honourable Justice R M Northrop.

Associate:

Date: 6/12/96

ATTACHMENT

Counsel for the applicant: Mr P L'Estrange

Solicitor for the applicant : Armstrong Ross

Counsel for the respondent: Mr A Cavanough

Solicitor for the respondent: Australian Government Solicitor

Hearing dates: 25-26 November 1996